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# Public Prosecutor v Winson a/l Sinivasan

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HIGH COURT (SEREMBAN) — CRIMINAL TRIAL NO 45–3 OF 2007
ABDUL ALIM ABDULLAH J
8 SEPTEMBER 2008

C

*Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Trafficking cannabis — Allegation of — Accused was asleep when house raided — Exclusivity of occupation — Whether house accessible by others — Whether evidence of possession and knowledge proven against accused person — Whether prima facie case of trafficking made out — Whether there was contradiction in prosecution's evidence*

D

*Criminal Procedure — Prosecution — Prima facie case — Close of prosecution's case — Whether made out against accused person — Criminal Procedure Code s 180*

E

On 6 July 2006, PW4 had, while conducting 'Ops Tapis Khas', received a telephone call at about 6.15pm from PW5 concerning a drug trafficking activity at Lot 6937, Sub-Lot 704, Jalan TTJ 2/4, Taman Tuanku Jaafar, Seremban, Negeri Sembilan. He and his party met PW5 at the compound of Taman Tuanku Jaafar Mosque at 6.25pm. By this time, PW5 already had with him one Mohd Adnan Razali under arrest. PW5 and his officers had earlier arrested the latter at 6pm at his (Adnan's) house where a quantity of drugs was recovered. Adnan then showed and directed PW4 and his party to the accused's house at Lot 6937. They had entered and searched the accused's house. They proceeded to the master bedroom where the accused was sleeping in bed. During the search, PW6, the wife of the accused, was kept outside the room and door was kept shut. From the search in the bedroom, they recovered, inter alia, two plastic packets of cannabis in the cupboard, which was not in a concealed position. PW6 was initially arrested but was released and not charged with any offence. PW6 testified that she had entered the house after returning from work, and at the material time the accused was sleeping. She further stated that she did not see the alleged drugs at the very section of the unlocked cupboard when retrieving the towel and sarong before adjourning to the bathroom. Barely ten minutes thereafter the police party had raided the house and had entered the bedroom when PW6 was already in the bathroom. PW6 testified that during the seizure of the drugs, she was locked out of the bedroom and did not witness the event.

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**Held**, acquitting the accused without calling for his defence:

(1) The exclusivity of possession that could implicate the accused was totally lacking. It was undisputed that three people occupied the bedroom and the room had remained unlocked as the doorknob was not in working condition, so too astonishingly the cupboard doors and the drawers of the dressing table. The accused's two sons and his mother stayed in two other rooms in the house. There has to be exclusivity in the sense that would exclude or not admit others to the place where the drugs were allegedly found (see paras 14–15).

(2) All that had happened took place behind the closed bedroom door and it was actually between the four police officers and the accused, not to mention PW5 who had with him the drugs he had earlier seized from Adnan's house (see para 19).

(3) PW5 in his evidence plainly contradicted himself when testifying the quantity of drugs that he had recovered in Adnan's house which he had brought with him into the accused's bedroom. His presence in the accused's room was very questionable, not to mention his continued involvement in yet a different raid, and one that was under the charge of another raiding officer, PW4. He has rendered thin any evidence as to possession of the drugs by the accused. His action could be likened to one that was daredevil. He was incautious and heedless to the consequences of his actions. His involvement in the second raid so very soon after the first at Adnan's house, and bringing with him into the accused's bedroom the drugs earlier seized must be one that was foolhardy. He ought to have ceased participation upon being shown the accused's house whereat he fully knew that the continuing raid was one conducted by another raiding officer, PW4 (see para 20).

**[Bahasa Malaysia summary**

Pada 6 Julai 2006, PW4 semasa melakukan 'Ops Tapis Khas' telah menerima satu panggilan telefon kira-kira 6.15 petang daripada PW5 berkenaan dengan satu aktiviti pengedaran dadah di Lot 6937, Sub-Lot 704, Jalan TTJ 2/4, Taman Tuanku Jaafar, Seremban, Negeri Sembilan. Beliau dan pasukannya telah bertemu dengan PW5 di halaman Masjid Taman Tuanku Jaafar pada 6.25 petang. Ketika itu, PW5 sudah ada bersama-samanya seorang yang telah ditangkap bernama Mohd Adnan Razali. PW5 dan pegawai-pegawainya sebelum itu telah melakukan tangkapan pada pukul 6 petang di rumah Adnan yang mana sejumlah dadah telah ditemui. Adnan kemudiannya telah menunjukkan dan menunjuk arah kepada PW4 dan pasukannya ke rumah tertuduh di Lot 6937. Mereka telah memasuki dan menggeledah rumah tertuduh. Mereka kemudiannya meneruskan penggeledahan ke bilik tidur utama di mana tertuduh didapati sedang tidur di atas katil. Semasa

penggeledahan, PW6, isteri tertuduh, dihalang memasuki bilik dan pintu bilik adalah tertutup. Daripada penggeledahan di bilik tersebut, mereka telah menjumpai, antara lain, dua paket plastik kanabis di dalam almari, yang mana tidak berada di dalam posisi yang tersembunyi. Pada awalnya PW6 telah ditangkap tetapi telah dilepaskan dan tidak didakwa dengan mana-mana kesalahan. PW6 telah memberikan keterangan bahawa dia telah memasuki rumah selepas kembali dari kerja dan pada masa yang material tertuduh sedang tidur. Selanjutnya dia menyatakan bahawa, dia tidak melihat dadah yang didakwa di sudut almari yang tidak berkunci tersebut apabila mengambil tuala dan kain sarung sebelum beredar ke bilik mandi. Baru saja sepuluh minit, kemudiannya pasukan polis telah menyerbu rumah tersebut dan telah memasuki bilik tidur yang mana PW6 telah pun berada di dalam bilik mandi. PW6 telah memberikan keterangan bahawa ketika dadah dirampas, dia tidak dapat masuk ke dalam bilik tidur dan tidak menyaksikan kejadian tersebut.

**Diputuskan**, melepaskan tertuduh tanpa memanggilnya untuk membela diri:

(1) Milikan secara eksklusif yang boleh membabitkan tertuduh adalah keseluruhannya tidak mencukupi. Ianya tidak dipertikaikan bahawa tiga orang yang menggunakan bilik tidur tersebut dan bilik tersebut kekal tidak berkunci kerana tombol pintu tidak berfungsi dengan baik, begitu juga dengan pintu almari dan laci meja solek. Dua orang anak lelaki tertuduh dan ibunya tinggal di dalam dua bilik lain di dalam rumah tersebut. Perlu terdapat keadaan eksklusif yang mana mengecualikan atau tidak membenarkan sesiapa yang lain ke tempat di mana dadah didakwa dijumpai (lihat perenggan 14–15).

(2) Kesemuanya berlaku di dalam bilik tidur yang tertutup dan ia sebenarnya di antara empat pegawai polis dan tertuduh, termasuk PW5 yang mempunyai dadah yang telah dirampasnya daripada rumah Adnan sebelum itu (lihat perenggan 19).

(3) PW5 dalam keterangannya, dengan jelas bercanggah apabila memberikan keterangan berkenaan kuantiti dadah yang dijumpainya di rumah Adnan yang telah dibawanya ke dalam bilik tidur tertuduh. Kehadirannya di dalam bilik tertuduh begitu boleh dipersoalkan, juga penglibatannya yang berterusan di dalam serbuan yang lain iaitu di bawah pegawai serbuan yang lain, PW4. Dia telah menyebabkan tipisnya bukti pemilikan dadah oleh tertuduh. Tindakannya boleh dikatakan sebagai seorang yang nekad. Dia tidak berhati-hati dan tidak peduli dengan natijah tindakannya. Penglibatannya di dalam serbuan kedua tidak lama selepas serbuan pertama di rumah Adnan, dan membawa bersama-samanya ke dalam bilik tidur tertuduh dadah yang

dirampas sebelum itu mestilah seorang yang sangat berani. Dia sepatutnya berhenti dari terlibat selepas ditunjukkan rumah tertuduh, lantaran itu dia mengetahui bahawa serbuan selanjutnya adalah dilakukan oleh pegawai serbuan yang lain, PW4 (lihat perenggan 20).]

**Notes**

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.

For cases on s 39B(1)(a) Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

**Cases referred to**

*Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1, SC (refd)
*Choo Yoke Choy v PP* [1992] 2 MLJ 632, SC (refd)
*Idris v PP* [1960] 1 MLJ 296, CA (refd)
*Lee Chee Meng v PP* [1992] 1 MLJ 332, SC (refd)
*Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
*Pang Chee Meng v PP* [1992] 1 MLJ 137, SC (refd)
*PP v Chan Peng Fatt* [2000] 1 MLJ 179, HC (refd)
*PP v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2008] 4 CLJ 1, FC (refd)
*PP v Muhamad Nasir bin Shaharuddin* [1994] 2 MLJ 576, HC (refd)

**Legislation referred to**

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 37(da)(vi), 39B(1)(a), 39B(2)

*Mahmud Abdullah (Deputy Public Prosecutor, Head of Prosecution Unit, Negeri Sembilan) for the prosecution.*
*Jamal Abbas (Jamal Abbas & Co) for the accused.*

**Abdul Alim Abdullah J:**

The charge against the accused, Winson a/l Sinivasan reads as follows:

Bahawa kamu pada 6hb. Julai 2006 jam lebih kurang 6.45 petang di rumah Lot 6937, Sub Lot 704, Jalan TTJ 2/4, Taman Tuanku Jaafar, di dalam Daerah Seremban, dalam Negeri Sembilan telah mengedar dadah berbahaya iaitu cannabis seberat 345.61 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B (1) (a), Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

FACTS OF THE CASE

**[1]** ASP Mohd Isa Bidin ('PW4') who was conducting 'Ops Tapis Khas' on 6 July 2006 at Senawang Toll Plaza, Seremban received a telephone call at

about 6.15pm from Chief Inspector Norhisham Mustapar ('PW5') concerning a drug trafficking activity at Lot 6937, Sub-Lot 704, Jalan TTJ 2/4, Taman Tuanku Jaafar, Seremban, Negeri Sembilan.

**[2]** PW4 and his party met PW5 at the compound of Taman Tuanku Jaafar Mosque at 6.25pm. By this time PW5 already had with him one Mohd Adnan Razali ('Adnan') under arrest. The latter had earlier been arrested at 6pm by PW5 and his officers at his (Adnan's) house at No 5, TTJS Fasa 3, Jalan Besat, Taman Tuanku Jaafar, Seremban, where a quantity of drugs was recovered.

**[3]** After a short briefing by PW4 to the police team members (numbering twelve) Adnan then showed and directed PW4 and his party to the accused's house at Lot 6937. They proceeded in a police vehicle at 6.35pm and arrived at 6.45pm. As directed in the briefing, the respective police personnel took up positions to guard the accused's house at the front and at the rear, while PW4, PW5, Sgt Wahab and L/Cpl Sanusi were to enter and search the accused's house.

**[4]** PW4 identified himself as a police officer and together with his team thereupon entered the house. They proceeded to the master bedroom where they found the accused sleeping in bed. They conducted a thorough search of the bedroom and recovered the items as follows:

(a) on the dressing table, a brown purse branded 'Dejinle' (P31) in which were found:

(i) two (2) plastic packets of cannabis (P15C and P15D);

(ii) accused's identity card;

(iii) one toll receipt;

(iv) one calling card bearing the name of Joshua Kumaranathan of Public Bank;

(v) three betting slips;

(vi) four Thye Foh (Seremban) Sdn Bhd Pawnshop receipts;

(vii) a photograph of an Indian lady;

(viii) four payment receipts of Seremban Cab Sdn Bhd in the name of Winson a/l Sinivasan;

(ix) one US dollar note; and

(x) one 100 rupee note.

(It is to be noted that the above items (ii) to (x) were never identified nor tendered as evidence in the trial);

(b) in the unlocked drawer of the dressing table, a small plastic bottle branded 'Pacwin' (P11) with letters on it in Chinese characters containing cannabis;

(c) underneath the bed, two plastic packets containing cannabis (P15A and P13);

(d) underneath folded clothes beneath the paper lining of the middle rack of a clothes rack, a plastic packet containing cannabis (P15B);

(e) in the unlocked cupboard, a black clutch bag branded 'Miland Original Design Series' (P30) on a stack of folded clothes containing a compacted block of cannabis (P8).

**[5]** The suspected cannabis as exhibited in court were marked by the investigation officer, Inspector Nursaiful Asrar Ahmad Naajim (PW7) and submitted to the chemist, Abdul Rahim Shadan (PW1) for analysis. All the above items are set out hereinbelow:

| Exhibits | Marked envelopes | Analysis |
|---|---|---|
| (a) P8 | E1 | 321.32 gm |
| (b) P11 | E2 | 5.56 gm |
| (c) P13 | E3 | 4.16 gm |
| (d) P15A | E4 | |
| (e) P15B | E5 | 14.57 gm (combined) |
| (f) P15C | E6 | (E4, E5, E6 & E7) |
| (g) P15D | E7 | |

**[6]** It is observed from the above that there is no known distinct weights of the drugs in the two plastic packets (P15C and P15D) that were found in the said purse (P31), since they have been combined and analysed together with P15A and P15B. There had been no specific directions by PW7 for a separate analysis of P15C and P15D. In other words, there is no known quantification of the drugs found in the said purse (P31) to cast liability on its owner or possessor.

CASE FOR THE PROSECUTION

**[7]** Put simply, the prosecution contended that the accused had possession and knowledge of all the drugs found in the room which he shared with his wife (PW6) and child, then only 10 years old. The learned deputy public

prosecutor ('DPP') submitted the invocation of the presumption under s 37(da)(vi) of the Dangerous Drugs Act 1952. He also submitted that the drugs were hidden by the accused to the ignorance of PW6 and that they were found in his proximity and that it is preposterous to suggest that the police raiding party had placed the drugs in the accused's room, to quote his intemperate language in his written submission '... Tiada sebab untuk pihak polis berbuat kerja gila seperti itu ...'. He also submitted that the drugs were found in the presence of only the accused and the four police officers behind the closed bedroom door. PW6 was at that time locked out and had remained guarded by the police in the hall.

BURDEN ON THE PROSECUTION AT THE CLOSE OF THE PROSECUTION'S CASE

**[8]** In accordance with s 180 of the Criminal Procedure Code, at the close of the prosecution case, it is incumbent upon this court to determine whether or not the prosecution has established a prima facie case. As stated by Gopal Sri Ram JCA in *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA:

> ... it is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution has made out a prima facie case.

And further on in the case:

> ... It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal ...

The Court of Appeal also cautioned further on in the case that:

> ... But we would emphasise and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case ...

And

> ... In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage ...

**[9]** This court now has to consider whether a prima facie case has been made out against the accused. There has to be a maximum evaluation of the evidence placed before it, and in doing so it would only then be able to test the credibility of the evidence of the witnesses for the prosecution. There has to be a meticulous examination of the evidence.

VERACITY OF THE PROSECUTION'S EVIDENCE

**[10]** The prosecution gave prominence and brought to the fore the evidence of the following witnesses:

(a) *ASP Mohd Isa Bidin (PW4) the raiding officer*

He is the Pegawai Turus Siasatan, Jabatan Siasatan Jenayah Narkotik, Ibu Pejabat Kontigen, Negeri Sembilan. His testimony as to the discovery of the drugs in the accused room has been described in paras 1 to 4 above. It is pertinent to note that this witness had testified the following unremarkable evidence:

(i) that upon entry of the accused's bedroom, the latter was asleep;

(ii) that the documents set out in para 4(a)(ii) — (x) were found in the brown purse (P31) (though never identified nor tendered in court);

(iii) the drugs P11 and P8 respectively that were recovered in the drawer and the cupboard were both unlocked;

(iv) the compacted block of cannabis (P8) in the black clutch bag (P30) was placed on top of a stack of folded clothes;

(v) that during the search of the accused's bedroom, PW6 was kept outside the room under the charge of Lance Corporal Aishah Jalal;

(vi) A search list (P28) was prepared and PW6 was only thereafter arrested;

(vii) that during the search of the accused's bedroom by him and PW5 with two other officers, its door was kept shut;

(viii) P30 (the black clutch bag containing the compacted block of cannabis) could be seen upon opening the cupboard and was not in a concealed position;

(ix) changed his testimony in cross examination as to the actual state of the finding of P30 wherein he testified that it was in its upright position behind a stack of folded clothes with its top half visible upon opening the cupboard door;

(x) that the drugs earlier seized by PW5, the raiding officer at Adnan's house at about 6.15pm, were brought into the accused's room by PW5 himself who had joined the search; and

(xi) confirmed that the objective of the 'Operasi Tapis Khas' was to arrest suspects 'at any cost' (to use his expression).

(b) *Chief Inspector Norhisham Mustapar (PW5)*

He is the raiding officer of Adnan's house which took place at about 6.15pm, earlier to the raid of the accused's house. Adnan had claimed the accused had sold him the drugs that were seized in his house. PW5 who also raided the accused's house brought along with him the drugs (in a yellow paper bag) he had seized from Adnan's house and was present with PW4 and two other police officers during the search of the accused's room behind the closed bedroom door. This witness gave testimony:

(i) that the accused was sleeping upon entry of the bedroom;

(ii) that PW6 (wife of accused) was not permitted to be in the bedroom when the police officers searched it;

(iii) that P30 (the black clutch bag) was not concealed and could be seen by anybody opening the cupboard door, in his words ... P30 boleh dinampak oleh sesiapa yang buka pintu almari ...;

(iv) that the cannabis PW5 had seized from Adnan's house was in a compacted form and similar to the one seized from the accused's bedroom as seen in photograph P19F saying '... dibaluti dengan kertas timah dan plastik lutsinar dan diselotapekan ..., and admitting at the same time that the items he had earlier seized were never marked at all by him; and

(v) in cross-examination and when shown D37 (his own police report of the raid of Adnan's house) he confirmed having contradicted himself when giving evidence-in-chief that only one compacted block was recovered. D37 revealed that two compacted blocks of cannabis were recovered, one having similar features to that one found in the accused's bedroom (P30) and also 10 plastic packets containing cannabis.

(c) *Kalama a/p Marimuthu (PW6)*

PW6 is the wife of the accused and by far, a very startling witness called by the prosecution. She was arrested but was released and not charged with any offence on instructions by the DPP. This witness testified the following:

(i) that she and her son also occupied the bedroom where the drugs were allegedly recovered;

(ii) that the door knob was wobbly and the room door could not be locked;

(iii) that she jointly used the cupboard with the accused where P30 was found and that their clothes (including the son's) were in it;

(iv) that (amazingly yet shockingly, disturbing though to the prosecution case) she testified that she had returned home at 6.30pm that day. The accused was sleeping then and she had opened the right (unlocked) door of the cupboard (as in photo P20G where P30 was found) to take her towel and sarong before having a bath and shortly after ten minutes, the police had raided the house. She categorically stated that she did not see nor find P30 in the cupboard; and

(v) so too did she testify that she did not visibly see anything under the bed upon entering the bedroom as the bed linen had been folded under the mattress edge.

Reproduced below are the pertinent lines in her testimony in cross-examination and re-examination:

*Cross-examination*

Pada 6.7.06 (hari kejadian) tombol pintu longgar dan tak boleh dikunci.

Saya dan suami saya gunakan almari itu ...

Dalam almari ada pakaian saya dan suami. Juga ada pakaian anak bongsu saya ...

Pada 6.7.06 sebelum jam 6.45 petang, saya ada mengambil pakaian saya dalam almari di gambar P20G.... saya buka pintu pertama dari kanan gambar untuk ambil pakaian ...

Soalan: Pada masa buka pintu almari untuk ambil pakaian, adakah tidak ternampak P30 di dalam almari?

Jawapan: Tidak nampak P30 berada dalam almari ...

Pada 6.7.06 pada masa saya pulang dari kerja saya ada buka pintu (kanan sekali) almari dalam P20G untuk ambil tuala mandi dan kain sarong saya. Saya kemudian buka pintu ketiga dan keempat dalam gambar (kiri) P20G.

Pada masa buka pintu-pintu almari dan sehingga polis datang ke rumah — jarak masanya adalah lebih kurang 10 minit ...

Pada masa saya ambil tuala dan kain dalam almari, suami saya (OKT) sedang tidur atas katil ...

Pada masa saya ambil barang-barang dalam almari, saya tak nampak ada barang-barang bawah katil ...

Selepas saya keluar dari bilik mandi saya diarah ke ruang tamu ...

Semasa di ruang tamu saya tak nampak suami saya kerana mereka (polis) telah tutup pintu bilik saya.

*Re-examination*

Semasa polis datang ke rumah, saya di bilik mandi dan semasa saya buka almari saya tak nampak P30 dalam almari. Saya tak tahu sama ada polis yang meletakkan beg P30 dalam almari. Saya tak pernah nampak beg P30 dalam rumah saya ...

Saya telah buka pintu pertama (kanan) dan ambil tuala dan sarong. Saya kemudian buka pintu almari ketiga dan keempat untuk simpan baju punjabi di dalamnya. Baju punjabi itu yang telah saya basuh untuk disimpan ...

Saya tidak nampak apa-apa barang di bawah katil kerana cadar hujung tilam dilipat ke bawah hujung tilam. Dengan itu saya jelas nampak kalau ada barang di bawah katil. Saya nampak tiada apa-apa di bawah katil ...

Pada hari kejadian, cadar di hujung tilam terlipat di bawah tilam dan tak tergantung. Dengan keadaan itu saya nampak tiada apa-apa barang di bawah katil ...

Selepas saya keluar dari bilik mandi saya diarah ke ruang tamu. Semasa di ruang tamu saya tak nampak suami saya kerana mereka (polis) telah tutup bilik saya.

EVALUATION OF THE EVIDENCE AT THE END OF THE PROSECUTION'S CASE

**[11]** The evidence of PW6 (wife of accused) is stunning and undisguised. Her testimony is definite. She testified simply that she did not see at all P30 (that contained the alleged drugs) at the very section of the unlocked cupboard when retrieving the towel and sarong before adjourning to the bathroom after having returned from work that day. Upon her return, the accused was asleep and barely ten minutes thereafter the police party had raided the house and had entered the bedroom and at which time too PW6 was already in the bathroom.

**[12]** Besides, PW6 also testified that no offending packets of cannabis (P13 and P15A) were seen or to be found under the bed (as contended by the police raiding party when she entered the bedroom upon her return from work that day as the view of the floor under the bed was unhindered.

**[13]** PW6 testified that on the day of the seizure of all the drugs in the bedroom, she was locked out and never ever witnessed the event. It is no surprise that she was unable to recognise the items seized when shown the photographs of the exhibits (P19A, P19E, P19F, P19G, P19H and P19I). Her testimony is evident at p 77 of the notes of evidence (lines 5–10). The search list (P28) is certainly a total fabrication that she had witnessed the recovery of the items therein mentioned. It is hard to swallow how PW6 had caused to be a signatory in P28 when she was locked out of the bedroom,

which evidence itself was corroborated by PW4 and PW5. P28 (para 2) is self-contradictory where it states the sole presence of the accused during the search of the bedroom by the police party but was instead signed by both the accused and PW6. Its execution displays the amateurish and blundering efforts of PW4. What could have happened in the bedroom is left much to be desired, not forgetting the fact that PW5 had brought along with him into the said room the drugs earlier seized from Adnan's house (see above explanation of PW4's evidence in para 10(a) and the non-sighting of the presence of the drugs in the bedroom by SP6 in para 10(c), upon her return from work). It is an unimaginable situation considering the fact, one that is corroborated by PW4 and PW6 that the accused was asleep in bed when they respectively entered the bedroom, and in that intervening period of ten minutes for something ghostly to have happened and all of a sudden for P30 (and its contents) to be found in the cupboard as claimed by the police raiding party. This court finds the prosecution story rather preposterous. The accused in slumber could do no two actions in one time save if he was sleep-walking.

**[14]** Some very useful authorities deserve mention on exclusivity of possession that could implicate the accused which this court finds totally lacking. It is undisputed that three people occupied the bedroom and the room had remained unlocked as the door knob was not in working condition, so too astonishingly the cupboard doors and the drawers of the dressing table. The accused's two sons and his mother stayed in two other rooms in the house.

**[15]** There has to be exclusivity in the sense that would exclude or not admit others to the place where the drugs were allegedly found. The following authorities have the following decisions:

(a) *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 332 (Supreme Court)

There was access by third parties. The was no exclusivity of use of the premises. The accused was acquitted.

(b) *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137

The accused shared a room with several others where the drugs were found. The accused had no exclusive use of the room or exclusive custody or control of the drugs. The accused was acquitted.

(c) *Public Prosecutor v Chan Peng Fatt* [1999] 1 MLJ 179

The drugs were found in the attic and the accused had no exclusivity to it. The accused was acquitted.

**[16]** The authorities above stress the importance of exclusivity of custody and control of the drugs by the accused. For there to be possession, accessibility by others to the place where the drugs are found must be excluded.

In *Public Prosecutor v Abdullah Zawawi bin Yusof* [1993] 3 MLJ 1, Edgar Joseph Jr SCJ (as he then was) observed that:

> Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

and further ...

> This question must be answered in favour of the appellant considering that there was more than one way in which the. evidence adduced by the prosecution might be viewed. The evidence indeed could have been regarded as implicating the appellant or the wife or both of them or the informer or even the other man living in the house.

**[17]** In *Choo Yoke Chov v Public Prosecutor* [1992] 2 MLJ 632 drugs were found in a room occupied by the accused and his wife and also in the kitchen which was accessible by the others in the house. Only the accused stood charged with the offence. The Supreme Court held that the prosecution failed to establish that the accussed had sole possession of the drugs. A doubt existed as there were two people who occupied the room and the others had access to the kitchen.

**[18]** In *Public Prosecutor v Muhammad Nasir bin Shaharuddin* [1994] 2 MLJ 576, it was held that if exclusive occupation of premises is not established, the occupier of the said premises cannot be said to have custody and control of everything found therein. And where two or more persons were found in a place where an offence had been committed and if the evidence did not clearly point to one or the other, the guilt of neither had been established.

**[19]** Now, adverting to the evidence of the case before this court, the thrust of prosecution's case stood with the evidence by PW4, the raiding officer and PW5, the other raiding officer of Adnan's house. The veracity of their evidence ran counter to the very evidence of PW6 whose latter evidence stood plainly acceptable yet uncontroverted. She was in the bedroom upon returning from work and barely ten minutes after, the police had raided the house and by which time she had adjourned to the bathroom. She simply did not see any drugs or any offending articles where visible upon entering the room and upon opening the cupboard. This court finds it punishing to exclude her evidence or even give little or no weight to it, more so in the light

of her very exclusion from the room to witness the recovery of the drugs. PW6 was initially arrested but was later released by the police on instructions by the DPP. All that had happened took place behind the closed bedroom door and it was actually between the four police officers and the accused, not to mention PW5 who had with him the drugs he had earlier seized from Adnan's house.

**[20]** The startling significant question mark to the prosecution story in all this is the presence of PW5 in the raid upon the accused's house. PW5 in his evidence plainly contradicted himself when testifying the quantity of drugs that he had recovered in Adnan's house and which he had brought with him into the accused's bedroom. It was only when he was alerted as to his police report (D37) that he owned up (see para 9(b)(v)). His presence in the accused's room is very questionable, not to mention his continued involvement in yet a different raid, and one that was under the charge of another raiding officer, PW4. Out of the wisdom of the learned DPP, he was called to testify. Certainly he is problematical to the veracity of the prosecution evidence. He has rendered thin any evidence as to possession of the drugs by the accused. His action can be likened to one that is daredevil. He was incautious and heedless to the consequences of his actions. His involvement in the second raid so very soon after the first at Adnan's house, and bringing with him into the accused's bedroom the drugs earlier seized must be one that was foolhardy. He ought to have ceased participation upon being shown the accused house whereat he fully knew that the continuing raid was one conducted by another raiding officer, PW4. He was footloose.

**[21]** Before concluding, it must be mentioned that there was scant evidence to allude possession by the accused of the two plastic packets (P15C and P15D) of drugs found in the brown purse (P31). Not one single document of the many documents found in it was tendered, let alone the identity card of the accused so as to point a finger at him. To compound matters, there is no known analysed weight of the contents of the two packets as they had been intermixed with the contents of other packets, namely, P15A and P15B giving a total weight of 14.57g (see item (iv) of the chemist's report in P6). A prudent investigation officer as one would expect in PW7, ought to have resulted in strict instructions being given to the chemist for separate analysis of the drugs found in the bedroom. This is but again an amateurish act by PW7. He had not put to proper order the collection of this piece of evidence.

**[22]** The accused's bedroom is non-exclusive. The bedroom is accessible by others in the house. There is no custody and control (see *Public Prosecutor v Muhamad Nasir bin Shahruddin* above). There is no incriminating evidence that could possibly link the accused to the drugs. A strong suspicion cannot take the place of proof of guilt (see *Idris v Public Prosecutor* [1960] 1 MLJ

296; *Public Prosecutor v Hanif Basree Abdul Rahman* [2008] 3 MLJ 161; [2008] 4 CLJ 1). The prosecution story is simply that the drugs were found in the bedroom. But yet PW6 (the accused's wife) whom the prosecution chose to call, testified that the alleged whereabouts as visibly seen by her showed no presence of the them at all. The evidence for the prosecution is further cluttered and put in disarray with the embroilment of PW5 having brought along the drugs which he had seized in an earlier raid and that which bore similar features to those allegedly found in the accused's room.

**[23]** This court finds the evidence at the end of the prosecution's case dreadfully unconvincing having given it due maximum evaluation. The accused was acquitted without calling for his defence. This could only be the plain obvious decision.

*Accused acquitted without calling for his defence.*

Reported by Ashgar Ali Ali Mohamed